

On January 19, 2007 appellant, then a 57-year-old post office clerk, filed a claim for pain in her left arm and shoulder which she attributed to her federal employment duties. She

indicated that she first realized her left arm condition on December 17, 2006 and its relation to her employment on December 20, 2006. Appellant stopped work on December 17, 2006 and returned to modified duties on January 5, 2007.

By decision dated March 15, 2007, the Office denied appellant's claim for an injury in the performance of duty as there was no medical evidence from a qualified physician which provided a diagnosis which could be connected to the claimed event. It found that the December 18, 2006 report of Dr. Jason Chung, a chiropractor, had no value in establishing appellant's claim as he did not diagnose a subluxation of the spine as demonstrated by x-ray evidence.

On April 7, 2008 appellant requested reconsideration of the Office's March 15, 2007 decision denying her claim. In support of her claim, she submitted medical reports from Dr. Mark Greenspan, an orthopedic surgeon, dated September 18, October 23 and December 4, 2007 and January 8 and February 19, 2008. In his reports, Dr. Greenspan diagnosed appellant with left shoulder tendinopathy, bursitis and bicipital tendinitis. He opined that appellant's conditions were caused by her work on the delivery bar code sorter (DBCS) machine as she described a viable mechanism of injury and her complaints and clinical findings were consistent with the type of injury described.

By decision dated April 14, 2008, the Office denied appellant's April 7, 2008 request for reconsideration without a merit review, finding that she had not timely requested reconsideration and had failed to submit evidence sufficient to establish clear evidence of error.

### **LEGAL PRECEDENT**

To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant must file his application for review within one year of the date of that decision.<sup>1</sup> The Board has found that the imposition of the one-year limitation does not constitute an abuse of the discretionary authority granted the Office under section 8128(a) of the Act.<sup>2</sup>

The Office, however, may not deny an application for review solely on the grounds that the application was not timely filed. When an application for review is not timely filed, the Office must nevertheless undertake a limited review to determine whether the application establishes clear evidence of error.<sup>3</sup> Office regulations and procedure provide that the Office will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set

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<sup>1</sup> 20 C.F.R. § 10.607(a).

<sup>2</sup> 5 U.S.C. § 2128(a); *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

<sup>3</sup> *See* 20 C.F.R. § 10.607(b); *Cresenciano Martinez*, 51 ECAB 322 (2000).

forth in 20 C.F.R. § 10.607(a), if the claimant's application for review shows clear evidence of error on the part of the Office.<sup>4</sup>

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.<sup>5</sup> The evidence must be positive, precise and explicit and must manifest on its face that the Office committed an error.<sup>6</sup> Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error. It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion. This entails a limited review by the Office of how the evidence submitted with the reconsideration request bears on the evidence previously of record and whether the new evidence demonstrates clear error in the most recent merit decision. To show clear evidence of error, the evidence submitted must be of sufficient probative value to shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of the decision. The Board makes an independent determination of whether a claimant has submitted clear evidence of error.<sup>7</sup>

### ANALYSIS

In its April 14, 2008 decision, the Office properly determined that appellant filed an untimely request for reconsideration. Its last merit decision in this case was dated March 15, 2007. Appellant requested reconsideration on April 4, 2008. Thus, the reconsideration request is untimely as it was made outside the one-year time limit.

The Board also finds that appellant's April 4, 2008 request for reconsideration failed to show clear evidence of error. Appellant submitted several medical reports from Dr. Greenspan, an orthopedic surgeon, in support of her untimely request for reconsideration. Dr. Greenspan provided several diagnoses on appellant's left shoulder condition and opined her medical conditions were attributable to her work on the DBCS machine. He stated that appellant's description of injury was a viable mechanism of injury and her complaints and findings were consistent with the type of injury described. However, these reports do not establish that the Office erred in its denial. The Board notes that clear evidence of error is intended to represent a difficult standard. Evidence such as a detailed, well-rationalized medical report which, if submitted before the merit denial might require additional development of the claim, is insufficient to establish clear evidence of error.<sup>8</sup>

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<sup>4</sup> 20 C.F.R. § 10.607(b); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3d (January 2004). Office procedure further provides that the term clear evidence of error is intended to represent a difficult standard. The claimant must present evidence which on its face shows that the Office made an error (for example, proof that a schedule award was miscalculated). Evidence such as a detailed, well-rationalized medical report which, if submitted before the denial was issued, would have created a conflict in medical opinion requiring further development, is not clear evidence of error. *Id.* at Chapter 2.1602.3c.

<sup>5</sup> See *Dean D. Beets*, 43 ECAB 1153, 1157-58 (1992).

<sup>6</sup> See *Leona N. Travis*, 43 ECAB 227, 240 (1991).

<sup>7</sup> *Nancy Marciano*, 50 ECAB 110 (1998).

<sup>8</sup> See *supra* note 4.

A review of the medical evidence of record does not establish that the Office erred in denying a merit review. Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error. Dr. Greenspan's reports do not raise a substantial question as to the correctness of the Office's March 15, 2007 merit decision or demonstrate clear evidence of error.

For these reasons, the Office properly denied appellant's request for reconsideration.

### **CONCLUSION**

The Board finds appellant's untimely request for reconsideration did not establish clear evidence of error on the part of the Office.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the Office of Workers' Compensation Programs' decision dated April 14, 2008 is affirmed.

Issued: January 14, 2009  
Washington, DC

David S. Gerson, Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge  
Employees' Compensation Appeals Board